

State v. Strode, Tony L.

No. 80849-0

C. JOHNSON, J. (dissenting)— For the reasons outlined in this court’s opinion in *State v. Momah*, No. 81096-6 (Wash. Oct. 8, 2009), Tony Strode’s conviction should be affirmed. However, this case presents one critical factor not addressed in *Momah* or given adequate consideration by the plurality or concurrence here: the importance of jurors’ privacy interests. Like the dissent in *Momah*, the plurality adheres strictly to its rule of automatic reversal whenever a closure occurs, regardless of underlying circumstances of the case before it. In doing so, the plurality neglects to balance the defendant’s right to an impartial jury with his right to a public trial under article I, section 22 of the state constitution and fails to consider the defendant’s participation in and obvious benefit from the closure.

In this case, the plurality dismisses out of hand the legitimate privacy interests of jurors. Juror privacy and candidness is particularly important in cases like this

that involve extremely sensitive matters. A review of the record in this case demonstrates that the trial judge balanced the compelling interests of juror privacy with the defendant's right to a public trial by an impartial jury and ordered a narrowly tailored closure that protected jurors' interests and ensured an impartial jury.

Record

Strode was charged with rape of a child in the first degree, attempted rape of a child in the first degree, and child molestation in the first degree. Given the sensitive nature of these charges, a written, confidential questionnaire was given to jurors. In it, the jurors were asked whether they, or anyone close to them, had either been a victim of sexual abuse or accused of committing sexual abuse.

Approximately 11 jurors answered "yes" to that question. One juror had been accused of misconduct against a boy and had lost his foster care license. Two of the jurors had been sexually abused or raped. Seven jurors had close friends or family who had been sexually assaulted.

In response to these answers, defense counsel agreed the court should individually voir dire the 11 jurors. Further, defense counsel actively participated in

the in-chambers questioning and exercised challenges for cause based on juror bias.

Before talking to each juror, the court made the purposes of individual questioning clear: to spare the jurors embarrassment of public questioning on these sensitive subjects and to facilitate full responses to the lawyers' questions to ensure fairness and impartiality. For example, the judge began voir dire with one juror as follows:

[Juror No. 41, you] answered yes to both questions on the juror questionnaire, and, of course, the reason we ask these confidentially is so we don't have to broadcast it . . . to the whole rest of the jury panel. But its [sic] important that we know whether it might affect your . . . fairness and impartiality . . . [1]

We should recognize, as the trial court did here, that jurors have a compelling interest in maintaining confidentiality in their private, personal affairs and that those interests are integrally connected to the defendant's right to an impartial jury.

Juror Privacy and the Impartial Jury Right

In order to ensure a defendant receives a fair jury trial, the court must facilitate processes that allow a defendant to make his case before an impartial jury; article I, section 22 guarantees this right. An impartial jury is comprised of

¹ Br. of Amicus Curiae Washington Association of Prosecuting Att'ys at 3.

individual jurors who have the ability and willingness to decide a case free of bias and on the evidence presented at trial. In order to empanel an impartial jury, the parties may engage in voir dire. Voir dire plays a critical role in ensuring a fair trial because it allows counsel to inquire into potential bias.

In cases such as this involving sexual abuse, counsel may voir dire jurors about experiences that may touch on deeply personal issues that might affect their ability to be fair and impartial. Jurors' willing and truthful disclosure of private information regarding such experiences is essential to ensuring the defendant's impartial jury right. Without jurors' disclosures, counsel cannot effectively exercise challenges to remove biased jurors from the venire.

However, public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors. Jurors may have good reasons for keeping their personal information out of the public domain. Therefore, in cases such as this one, courts must allow counsel to conduct voir dire in a way that facilitates candidness, safeguards juror privacy, and enables parties to vet biased and partial jurors. That is exactly what the trial judge did in this case by closing a portion of voir dire to the public. Had the judge failed to do so, counsel would not

only have undermined the court's procedural assurances that juror information will remain private but also would have jeopardized jurors' candidness and potentially the defendant's right to an impartial jury.

Procedural Assurances

Courts routinely assure prospective jurors through a variety of methods that their private information need not be disclosed to the public. Among these methods are the general court rules, Washington courts' juror guide, and juror questionnaires.

General Rule (GR) 31 is a procedural tool that facilitates juror privacy. This court rule states that "[i]ndividual juror information, other than name, is presumed to be private," and the rule also sets forth procedures for gaining juror information upon showing of good cause. GR 31(j). We adopted GR 31(j) in acknowledgment of the importance of juror privacy. Prospective jurors should reasonably expect courts to abide by GR 31 during voir dire.

Additionally, the *Washington Courts: A Juror's Guide*² assures jurors that confidential information may be privately disclosed to the judge. In describing voir dire, the guide explains that jurors may be asked personal questions that must be

² Prepared by the Superior Court Judges' Association and the District and Municipal Court Judges' Association of the state of Washington.

answered “completely and honestly,” but the guide assures jurors “if [they] are uncomfortable answering [such personal questions], tell the judge and he/she may ask them privately.”³ This guide acknowledges juror privacy interests and assures them that courts provide protective measures to ensure confidentiality.

Further, juror questionnaires give explicit assurances of confidentiality. For example, in this case, counsel submitted a juror questionnaire, which stated:

This case involves an allegation of sexual contact by defendant with a minor child. As a result, the court needs you to respond to the following questions . . . [y]our answers will be revealed only to the Prosecuting Attorney, the Defendant’s Attorney, the Defendant, the Judge, her/his staff and the Clerk, each of whom are under court order to keep the information confidential and under seal.[⁴]

When jurors respond to the questions, they should reasonably expect courts to be truthful and maintain the confidentiality of extremely sensitive, personal, and perhaps traumatic experiences.

Through the above methods, as well as other means, courts routinely assure jurors that their private information will remain private. The courts’ assurances serve at least two purposes: to respect individuals’ privacy interests and to

³ *Washington Courts: A Juror’s Guide*, http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide

⁴ Confidential juror questionnaire attached as an appendix to Respondent’s Brief to the Court of Appeals.

guarantee an impartial jury. The trial court's decision in this case to order a temporary closure of a portion of voir dire is consistent with these purposes and furthered the primary goal of *Bone-Club*'s⁵ balancing test: to protect the defendant's right to a fair trial.

Balancing Interests

The plurality recognizes the trial court's affirmative duty to safeguard the public trial right by engaging in *Bone-Club*'s five-factor balancing test. Plurality at 6. However, the plurality's contention that the record “lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club* . . .” is not an accurate representation of the record. Plurality at 7 (alteration in original) (quoting *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005)).

Although the trial judge did not conduct an explicit *Bone-Club* analysis, she implicitly balanced the interests at stake before temporarily closing the courtroom. First, as demonstrated above, the trial court identified two compelling interests that would be jeopardized by open voir dire: the defendant's right to public trial by an impartial jury and jurors' privacy interests. Second, the defendant could have

⁵ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

objected to the in-chambers voir dire at any time prior to the closure, but he chose not to and, instead, actively participated in the questioning. Third, the temporary closure was narrowly tailored to protect the interests of those 11 jurors who identified themselves as experiencing or accused of committing sexual abuse. Fourth, the record does not indicate that any members of the public were present to object to the closure. Fifth, the in-chambers questioning focused primarily on the jurors' answers to the two questionnaire queries involving their experiences with sexual abuse.

Thus, contrary to the plurality's contention that the record "lacks any hint" that the trial judge engaged in weighing the competing interests, the record demonstrates that the trial court implicitly considered and ultimately safeguarded both the jurors' privacy interests and the defendant's impartial jury right.

Conclusion

The plurality's strict adherence to the automatic reversal rule for the trial court's failure to perform an explicit *Bone-Club* analysis leads it to neglect the specific facts, rights, and interests at stake in this case. The plurality ignores Strode's right to an impartial jury under article I, section 22 and dismisses the

legitimate privacy interests of jurors. As in *Momah*, requiring an automatic reversal of Strode's conviction gives the defendant a windfall for participating in and likely benefiting from the very closure he now claims as error. Additionally, the plurality's failure to give due consideration to jurors' privacy interests undermines the court's assurances that jurors' private information will remain private and jeopardizes the defendant's right to an impartial jury.

AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Justice James M. Johnson

Joel M. Penoyar, Justice Pro Tem.
